

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CAROL BRUCE

Claimant

VS.

SPIRIT AEROSYSTEMS, INC.

Respondent

AND

AMERICAN HOME ASSURANCE CO. and

INS. CO. OF STATE OF PENNSYLVANIA

Insurance Carriers

Docket No. 1,044,349

ORDER

Claimant requests review of the September 15, 2009 preliminary hearing Order entered by Administrative Law Judge John D. Clark.

ISSUES

The Administrative Law Judge (ALJ) denied claimant's request for temporary total disability. He reasoned that because respondent had one-handed work available to claimant, who retired from respondent's employ in April 2009, she was not qualified to receive benefits.

The claimant requests review of this decision first arguing she is entitled to temporary total benefits for the loss of use of her injured extremity pursuant to K.S.A. 44-510d(a) and that the ALJ erred and/or exceeded his jurisdiction in failing to grant her those benefits.

The respondent contends the Board has no jurisdiction over this dispute at this juncture of the claim. And even if jurisdiction is found, claimant is not entitled to the benefits she seeks as the Act, when read as a whole, does not contemplate *temporary* total loss of use benefits. Nor is claimant qualified for temporary total disability benefits as

accommodated work is available to her, and but for her voluntary retirement, she would be available to work. Thus, respondent urges the Board to affirm the ALJ's Order in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

The underlying facts of this claim are largely undisputed. Claimant sustained a compensable injury in February 2008. Her E-1 does not disclose the nature of her injuries, but the record indicates her injuries were alleged to have occurred primarily to her shoulder although she also alleges injury to her back. Claimant has been receiving treatment for her shoulder complaints. On April 23, 2009, she voluntarily retired from respondent's employment. She gave no reason for her decision to retire at the time the paperwork was completed although she now attributes that decision to the ongoing burden of her physical complaints which she attributes to her work injury.

On August 10, 2009, claimant underwent surgery to her shoulder. She was released after that surgery to return to one-handed work duties. Respondent received claimant's restrictions and according to respondent's representatives, accommodated work is available within those restrictions. Claimant has now moved from the area but maintains she is nonetheless entitled to benefits. Thus, the preliminary hearing was initiated.

As required by the Act, claimant made a demand for the benefits she maintains she is entitled.¹ Included within this demand was a request for temporary total disability benefits and *temporary total loss of use* benefits. When this demand was not met, a preliminary hearing was held. At that hearing, claimant's counsel made it clear he was not only asking for temporary total disability benefits pursuant to K.S.A. 44-510c² but also those benefits mentioned in K.S.A. 44-510d.³

¹ K.S.A. 44-512a.

² K.S.A. 44-510c(2) provides: "Temporary total disability exists when the employee, on account of the injury, has been rendered completely and temporarily incapable of engaging in any type of substantial and gainful employment."

³ K.S.A. 44-510d provides as follows (in relevant part)

K.S.A. 44-510d. Compensation for certain permanent partial disabilities; schedule.

(a) Where disability, partial in character but permanent in quality, results from the injury, the injured employee shall be entitled to the compensation provided in K.S.A. 44-510h and 44-510i [medical treatment] and amendments thereto, Thereafter compensation shall be paid for temporary total loss of use and as provided in the following schedule. . . .

I would like to reiterate even if temporary total disability is ruled not to apply in this case, under the scheduled injury statute, it is clear she has lost the use temporarily of her right arm, right shoulder, and under that statute that says she is entitled to compensation for periods of temporary total loss of use of an extremity. So we would ask that those benefits be paid to her until she is released to be able to use that right upper extremity.⁴

The ALJ was unpersuaded by claimant's novel argument and denied her request for benefits. His order makes it clear that he denied her claim based on the fact that she voluntarily terminated her employment with respondent, thus depriving respondent of the opportunity to accommodate her work restrictions. Thus, she was not qualified for temporary total disability benefits. This appeal followed.

Before claimant's arguments can be addressed, this member must consider whether there is jurisdiction for this appeal. K.S.A. 44-534a restricts the jurisdiction of the Board to consider appeals from preliminary hearing orders to the following issues:

- (1) Whether the employee suffered an accidental injury;
- (2) Whether the injury arose out of and in the course of the employee's employment;
- (3) Whether notice is given or claim timely made;
- (4) Whether certain defenses apply.

These issues are considered jurisdictional and subject to review by the Board upon appeals from preliminary hearing orders. The Board can also review a preliminary hearing order entered by an ALJ if it is alleged the ALJ exceeded his or her jurisdiction in granting or denying the relief requested.⁵

In this instance, claimant asserts an entitlement to *temporary total loss of use* as an alternative to temporary total disability benefits. And the argument with respect to the loss of use of claimant's shoulder and her claim for temporary benefits as a result of that loss of use is a novel one. Claimant also contends the Board has jurisdiction over the denial of her request for loss of use benefits because that Order "is a final order regarding statutorily mandated compensation" under K.S.A. 44-510d.

This Board Member disagrees with claimant's contention with respect to jurisdiction. In either instance, the benefits she seeks are temporary in nature and are not

⁴ P.H. Trans. at 29.

⁵ See K.S.A. 44-551.

encompassed within any of the delineated issues set forth in K.S.A. 44-534a. Simply put, whether claimant is entitled to weekly benefits on a temporary basis is not jurisdictional on an appeal from a preliminary hearing order and has long been held to be an issue that an ALJ is allowed to determine. It would be inconsistent to find jurisdiction on an appeal for a denial of temporary benefits arising out of a loss of use (assuming such benefits exist) and to deny jurisdiction for one who was denied temporary total disability benefits. Moreover, the Order is not final because claimant can request those benefits at the time of the final award.

This Board Member finds that she has no jurisdiction to consider this issue. Nor does it appear the ALJ exceeded his jurisdiction in failing to award the temporary loss of use benefits, particularly given the fact that the argument claimant asserts is unique and to date, untested.⁶ Thus, the ALJ is found to have not exceeded his jurisdiction.

When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.⁷ Accordingly, claimant's appeal is dismissed.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.⁸ Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the appeal from the Order of Administrative Law Judge John D. Clark dated September 15, 2009, is dismissed for lack of jurisdiction.

⁶ Moreover, claimant's argument is somewhat problematic. It seems that claimant has "cherry picked" language from a statute that is intended to address compensation issues for permanent partial disabilities in the hopes of recovering additional temporary benefits for loss of use. To be clear, the statute uses the phrase "temporary total loss of use" but if claimant's argument would prevail, it would dramatically alter the compensation scheme set forth in the Act in a way wholly un contemplated by the Legislature. It seems more logical that the language utilized is really meant to be read as "temporary total disability" and that "disability" and "loss of use" are interchangeable in this context.

⁷ See *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

⁸ K.S.A. 44-534a.

IT IS SO ORDERED.

Dated this _____ day of November 2009.

JULIE A.N. SAMPLE
BOARD MEMBER

c: Michael L. Snider, Attorney for Claimant
Vincent A. Burnett/Dallas L. Rakestraw, Attorneys for Respondent and its Ins. Carrier
John D. Clark, Administrative Law Judge